



Comptroller General  
of the United States  
Washington, D.C. 20548

1007-103

## Decision

**Matter of:** TLC Services Inc.

**File:** B-255758

**Date:** March 28, 1994

Elizabeth Aviles-Rogers for the protester.  
Nick R. Hoogstraten, Esq., Bastianelli, Brown & Touhey, for  
Ruppert Landscape, Inc., an interested party.  
Talbot J. Nicholas II, Esq., Pennsylvania Avenue Development  
Corporation, for the agency.  
Richard P. Burkard, Esq., and John Van Schaik, Esq., Office  
of the General Counsel, GAO, participated in the preparation  
of the decision.

### DIGEST

1. Protest against agency's determination not to set aside procurement for small business concerns is denied where agency concluded, prior to issuing the solicitation, that it could not reasonably expect to receive bids from at least two small business concerns at fair market prices and the agency's conclusion is supported by an extensive survey of the potential small business bidders conducted in response to the protest.

2. Protest against payment and performance bond requirements in invitation for bids for landscape maintenance services is denied where the agency requires the bonding in light of its need for uninterrupted performance.

### DECISION

TLC Services Inc. protests the terms of an invitation for bids (IFB) issued by the Pennsylvania Avenue Development Corporation (PADC) for landscape maintenance services along Pennsylvania Avenue in Washington, D.C. TLC complains that the solicitation should be issued as a small business set-aside and that the bonding requirements in the IFB are restrictive of competition.

We deny the protest.

The IFB was issued on October 20, 1993, on an unrestricted basis, with a closing date of November 16. The agency characterizes the work contemplated by the IFB as "urban gardening for a linear park of paramount national stature," noting that the contract requires "expert services of a

complex nature within a dense urban area of approximately 21 city blocks that include commercial and government buildings, museums, . . . parks and plazas." Specifically, the contract requires rotational planting, detailed tree and shrub pruning and shaping, soil preparation, spraying and dusting, and furnishing and installing a variety of plants, including aquatic plants.

The IFB contains a provision which requires that within 5 days following acceptance of its bid, the awardee "furnish a satisfactory performance and payment bond in the amounts of One Hundred (100%) and Fifty percent (50%), respectively, of his total bid to guarantee the faithful performance" of the contract. A performance bond secures performance and fulfillment of the contractor's obligations under the contract, Federal Acquisition Regulation (FAR) § 28.001(f), while a payment bond assures payments as required by law to all persons supplying labor or material required for the contract. FAR § 28.001(e).

TLC argues first that the IFB should have been issued as a small business set-aside since acquisitions must be set aside for exclusive small business participation if the contracting officer determines that: (1) there is a reasonable expectation that bids will be obtained from at least two responsible small business concerns, and (2) award will be made at a fair market price. FAR § 19.502-2.

The agency reports that the decision to issue the IFB on an unrestricted basis and not as a small business set-aside was based on the agency's "general institutional experience" with the requirements of the contract and with the "kind of contractors that normally are capable of" performing such contracts. In response to the protest, however, the agency states that it undertook an "exhaustive" and "wide ranging" examination of the small business market for the required services. Although none of the 27 small businesses which requested the IFB submitted a bid by the bid opening date, the agency contacted and questioned several of those firms to determine if they would have been considered responsible had they submitted bids. In addition, it requested the Small Business Administration Procurement Center Representative list of small businesses to determine whether those companies were likely to be considered responsible if any had submitted bids. PADC also sought the names of potential small business bidders from its own staff and considered the names of firms provided by TLC, including TLC itself.

The agency found that most of the firms about which it obtained information "could not demonstrate the capability of doing this job owing to small staff, lack of equipment, wrong kind of equipment, distance from the site, or lack of

experience in urban gardening." PADC found that most were experienced with large open-field mowing contracts in suburban or military settings. It found that those firms which demonstrated some experience in working in urban areas did not demonstrate a capability "of sustaining excellence and the ability to handle the complexities required in the Pennsylvania Avenue development area." Based on the post-protest examination of the market, the agency concludes that it could not expect that any small business firms would be found responsible. Moreover, PADC states that it is "not confident that any of the small businesses considered or contacted could bid at a fair market price." Accordingly, it argues that the agency acted within its discretion in issuing the IFB on an unrestricted basis. We agree.

Generally, we regard a contracting officer's decision about whether to set aside a procurement as a matter of business judgment within the contracting officer's discretion, which we will not disturb absent a clear showing that it has been abused. FKW Inc., B-249189, Oct. 22, 1992, 92-2 CPD ¶ 270. Under FAR § 19.502-2, a procurement is required to be totally set aside for small business when there is a reasonable expectation of receiving bids from at least two responsible small business concerns, and the award can be made at a reasonable price; conversely, unless such a determination can be made, a total small business set-aside should not be made. The contracting officer must undertake reasonable efforts to ascertain whether there is a reasonable expectation that two or more responsible small business concerns will actually submit bids. See State Mgmt. Servs., Inc., B-251715, May 3, 1993, 93-1 CPD ¶ 355.

Here, there has been no showing that the agency abused its discretion in issuing the IFB on an unrestricted basis. First, as stated, despite the fact that 27 small businesses requested the solicitation, none submitted a bid. Second, even after the agency's post-protest survey of small business firms, the agency could not find that at least two small business firms were capable of performing the contract. While the protester argues that the agency's examination of the market included "'de facto' evaluation criteria" which were used to disqualify several small businesses, TLC does not identify the criteria that it alleges were improperly applied. Contrary to the protester's assertion, the record shows that the agency's examination applied traditional responsibility standards by focusing on the firms' ability to comply with the required performance schedule, their experience, and whether they have the necessary equipment. See FAR § 9.104-1. We

therefore have no basis to question the agency's determination to issue the IFB on an unrestricted basis.<sup>1</sup>

TLC next argues that the IFB's bonding requirements are restrictive of competition since they are burdensome to small businesses, many of which have difficulty in raising capital to obtain the bonds. The protester asserts that there are no extraordinary circumstances here which warrant requiring payment and performance bonds. TLC also argues that the bonding requirements are inappropriate here since generally bonds are required for construction contracts.

Although, as a general rule, in the case of nonconstruction contracts, agencies are admonished against the use of bonds, the FAR authorizes the contracting officer to require a performance bond "when necessary to protect the government's interest" and recognizes that there are situations in which bonds may be necessary for nonconstruction contracts. See FAR §§ 28.103-1(a) and 28.103-2(a); D.E.W. Mgmt. Servs., Inc., B-246955, Apr. 10, 1992, 92-1 CPD ¶ 358. A payment bond is proper where a performance bond is required and if the use of a payment bond is in the government's interest. FAR § 28.103-3(a). While bonds may, in some circumstances, result in a restriction of competition, this alone does not render them improper. See Remtech, Inc., B-240402.5, Jan. 4, 1991, 91-1 CPD ¶ 35.

In reviewing a challenge to the imposition of a bonding requirement we look to see if the requirement is reasonable and imposed in good faith. Maintrac Corp., B-251500, Mar. 22, 1993, 93-1 CPD ¶ 257. A finding on the part of the agency that continuous operations are necessary is a sufficient basis for requiring performance and payment bonds. D.E.W. Mgmt. Servs., Inc., supra (requirement for performance bond proper in IFB for mess attendant services); Professional Window and Housecleaning, Inc., B-224187, Jan. 23, 1987, 87-1 CPD ¶ 84 (requirement for bid, performance, and payment bonds proper in IFB for custodial and general housecleaning services).

We conclude that PADC reasonably imposed the bonding requirements based on its need for uninterrupted landscape maintenance services. PADC points to the national significance of the property to be maintained and explains that the performance bond is necessary to ensure that, should the contractor default, the agency will "have a vehicle to mitigate damages due to delays in planting,

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<sup>1</sup>While the protester argues that only the SBA is authorized to make this determination, the regulation specifically states that it is to be made by the contracting officer. FAR § 19.502-2.

fertilizing, and repairing landscape or due to increased cost of obtaining a replacement contractor on short notice." In this regard, the IFB requires interdependent rotational stages of soil preparation, plant purchase, planting, plant removal, and plant replacement. The agency explains that if the contractor fails to perform in accordance with the specified planting schedule, not only will the appearance of the landscape be adversely affected, but also preparatory work would likely be wasted and costs duplicated. The agency states that the bond provides a "measure of security" and, in the case of default, could be used to recover resulting excess costs.

Additionally, PADC states that the payment bond is necessary because the contractor is required to order a substantial amount of botanical and other materials from suppliers. The agency states that use of the payment bond ensures that the suppliers have an avenue of recourse to obtain payment in the event that payment disputes arise where the contractor does not pay a supplier, particularly after the agency has paid the contractor. Accordingly, the payment bond is intended to reduce the risk that performance will be disrupted. The protester has made no showing that the agency's concerns here are unreasonable.

Finally, TLC argues that requiring a performance bond does not ensure that the contractor will not default and points out that there are other incentives for contractors to perform successfully, such as the potential for termination or debarment. We have specifically rejected arguments that the same government interest which a performance bond is designed to protect is adequately protected by other elements of the procurement process or by contract administration. D.E.W. Mgmt. Servs., Inc., supra. While there are other factors which may reduce the risks associated with poor performance of this contract, some risk would remain. A performance bond is a legitimate means of reducing this risk. Id.

The protest is denied.

*Robert P. Murphy*  
 -N Robert P. Murphy  
 Acting General Counsel